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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of)

BRUCE DAVID BLANCHARD)
LIMITED PARTNERSHIP)

J.H. COMMUNICATIONS)

For Construction Permit for a)
New FM Station on Channel 295A)
(106.9 MHz) in Ocean City, MD)

MM Docket)

92-64)

File No. BPH-901226MA)

File No. BPH-901226MB)

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

To: The Office of the General Counsel

MOTION FOR SUMMARY RESOLUTION OF SETTLEMENT PETITION

WIND 'N SEA FM LIMITED PARTNERSHIP ("Partnership"), pursuant to Sections 1.41 and 73.3525 of the Commission's Rules,^{1/} hereby requests that the General Counsel summarily resolve the "Petition for Approval of Settlement Agreement," filed October 13, 1993 by Bruce David Blanchard, Limited Partnership ("Blanchard") and JH Communications ("JH"). In light of the failure of Blanchard to document its expenses pursuant to Section 73.3525, the General Counsel should proceed to approve the Settlement Agreement between JH and Blanchard but deny the request for reimbursement of expenses to Blanchard. In support whereof, the following is respectfully set forth.

I. Status Of Settlement Agreement

1. Blanchard filed an application mutually exclusive with those of JH and Partnership. However, the Commission dismissed

^{1/} 47 C.F.R. §§ 1.41, 73.3525.

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Blanchard's application for failure to pay the required hearing designation fee. Wind 'N Sea FM Limited Partnership (Hearing Designation Order), 7 FCC Rcd 2293, n. 1 (Aud. Serv. Div. 1992).

2. The Settlement Agreement between Blanchard and JH recites that on April 13, 1992, Blanchard filed an application for review of the dismissal of its dismissal. (Settlement Agreement, p. 1). Blanchard's request for Commission review is still pending. Id. Thus, the grant of JH's application is conditioned upon the resolution of Blanchard's timely filed appeal of the dismissal of its application.

3. On October 13, 1993, JH and Blanchard filed a "Petition for Approval of Settlement Agreement" (the "Joint Petition"). By the terms of the Settlement Agreement, Blanchard would dismiss his pending appeal of the fee decision of the Managing Director. The Joint Petition was unopposed. The Office of General Counsel has the delegated authority to act upon Joint Petition and Settlement Agreement because the dismissal of Blanchard's application is before the Commission itself. 47 C.F.R. § 0.251(f)(11).

4. In the Petition, Blanchard included a declaration under penalty of perjury reciting that settlement was in the public interest, that the agreement was the complete understanding between JH and Blanchard, and that Blanchard had not filed his application for purposes of settlement as required by Section 73.3525 of the Rules. However, Blanchard did not provide any documentation of the expenses of the prosecution of its application. Moreover, the declaration did not even recite that the settlement payment did

not exceed Blanchard's expenses incurred in the prosecution of its application. *Blanchard has never supplemented this showing in the 6 months since the filing of the Petition.*^{2/}

5. The Joint Petition and the Settlement Agreement are ripe for decision by the Office of the General Counsel. In light of Blanchard's failure to provide the documentation necessary for reimbursement of expenses, the General Counsel should grant the Joint Petition but deny the request for reimbursement.

**II. The Discretion Of A Delegated Authority
Is Limited When An Applicant Fails To
Justify Its Request For Reimbursement Of Expenses.**

6. Effective August 1, 1991, any applicant in a comparative broadcast proceeding that seeks to dismiss its application in consideration of a monetary payment is limited to a reimbursement of its legitimate and prudent expenditures in the prosecution of its application. 47 C.F.R. § 73.3525(a). See also, Settlement Agreements Among Applicants for Construction Permits, 6 FCC Rcd 85 (1990), recon. 6 FCC Rcd 2901 (1991). Section 73.3525(a)(4) states in pertinent part that each dismissing applicant must demonstrate that the consideration to be paid to it does not exceed "the legitimate and prudent expenses of the applicant" and must include "[a]n itemized accounting of the expenses for which it seeks reimbursement." 47 C.F.R. § 73.3525(a)(4). The Commission has recently reiterated that only settlements that conform to existing

^{2/} Section 5 of the Settlement Agreement expressly required that "application expense documentation" be filed "as soon as reasonably practicable following the execution of this Agreement."

Commission policy will be approved. Public Notice, FCC Freezes Comparative Proceedings, 9 FCC Rcd 1055 (Feb. 25, 1994) (only settlements "conforming to Commission policy may be submitted").

7. Prior to approval of a settlement, the Commission must be able to make a determination that such a Settlement will serve the public interest, convenience and necessity. 47 U.S.C. § 311(c)(3)(A). JH and Blanchard have stated that the public interest will be served by approval of the Settlement because it will obviate "the need for further costly and time-consuming appeals and by facilitating the early inauguration of new local FM service at Ocean City, Maryland." (Joint Petition, p.2). Blanchard has also stated that it did not file its application for purposes of settlement. *Id.* Thus, the Joint Petition and Settlement Agreement comply with 47 U.S.C. § 311(c)(3) and can be approved except for the reimbursement request.

8. The discretion of any delegated authority to depart from the specific requirements of the Commission's settlement rules is quite limited. See generally, SBM Communications, 6 FCC Rcd 5021 (Rev. Bd. 1991), *aff'd*, 6 FCC Rcd 5522 (1991) (delegated authority cannot alter specific requirements of Commission's revised settlement guidelines by accepting late-filed settlement). Thus, the Joint Petition can be granted only insofar as it seeks dismissal of Blanchard's application and pending appeal.

III. Partnership Is Harmed By The Delay.

9. Although the Joint Petition in other respects conforms with Section 73.3525 of the Rules, Blanchard has failed to provide the necessary justification of expenses. By this failure, Blanchard has not only delayed removing the cloud over the grant of JH's application, but also harmed Partnership.

10. More than 18 months ago, by *Memorandum Opinion and Order*, released September 14, 1992, the then-Presiding Judge in MM Docket No. 92-64, Edward Luton, approved a Settlement Agreement between JH and Partnership, whereby JH would pay Partnership the sum of \$37,500 as reimbursement of Partnership's expenses incurred in the prosecution of its application. Wind 'N Sea FM Limited Partnership, FCC 92M-952, released September 14, 1992, at ¶ 2.^{3/} The ALJ also granted JH's application and terminated the hearing proceeding. Id., at ¶ 4.^{4/}

11. The settlement payment in the agreement between JH and Partnership was contingent on the grant of JH's application becoming a final action, i.e., one no longer subject to appeal, reconsideration or review. Specifically, the settlement was contingent on resolution of the appeal by Blanchard of the dismissal of its application.

^{3/} A copy of the *Memorandum Opinion and Order* is Attachment 1 hereto.

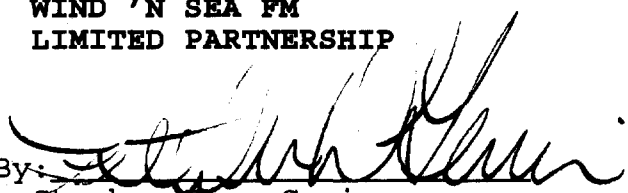
^{4/} Since that time, JH has even sought approval and received a grant of a modification of its construction permit. See, File No. BMPH-921208IF, granted April 1, 1994. See also, Public Notice, Report No. 21861, at p. 2, released April 11, 1994.

12. The Joint Petition by JH and Blanchard has now been pending before the Office of the General Counsel, pursuant to delegated authority, since October 13, 1993. Blanchard has failed to make the necessary showings for reimbursement of expenses required by Section 73.3525. The unopposed Joint Petition is ripe for decision by the General Counsel. 47 C.F.R. § 0.251(f)(11). Given Blanchard's failure to make the necessary showings, it should suffer the consequences -- denial of its request for reimbursement.

WHEREFORE, in view of the foregoing, Partnership respectfully requests that the Office of the General Counsel approve the Joint Petition insofar as it requests approval of the Settlement Agreement between Blanchard and JH, but deny the Joint Petition insofar as it seeks reimbursement of Blanchard's expenses.

Respectfully submitted,

**WIND 'N SEA FM
LIMITED PARTNERSHIP**

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Its Attorneys

Dated: April 12, 1994
0653/settle.mot

ATTACHMENT 1

REC'D SEP 16

Before the
FEDERAL COMMUNICATIONS COMMISSIONS
Washington, D.C. 20554

FCC 92M-952
04146

In re Applications of) MM DOCKET NO. 92-64
)
WIND N' SEA FM LIMITED PARTNERSHIP) File No. BPH-901224ME
)
J. H. COMMUNICATIONS) File No. BPH-901226MB
)
For Construction Permit for a)
New FM Station on Channel 295A)
in Ocean City, Maryland)

MEMORANDUM OPINION AND ORDER

Issued: September 10, 1992; Released: September 14, 1992

1. Under consideration are the following: 1) Joint Request for Approval of Settlement Agreement, filed August 14, 1992 by Wind N' Sea Limited Partnership and J.H. Communications; 2) Supplement to Joint Request for Approval of Settlement Agreement, filed August 19, 1992 by Wind; 3) Supplement to Joint Petition for Approval of Settlement Agreement, filed August 24, 1992 by J.H.; and 4) Mass Media Bureau's Comments on Joint Petition for Approval of Settlement Agreement, filed August 28, 1992. ^{1/}

2. The agreement of the applicants contemplates the grant of JH's application and the dismissal of Wind's application. JH will pay Wind \$37,500 in exchange for the dismissal, a sum representing Wind's legitimate and prudent expenses incurred in the preparation and prosecution of its application. The settlement agreement also withdraws JH's pledge to divest station WBSK-FN, Windsor, Virginia.

3. Both parties state that the settlement agreement will serve the public interest by eliminating the need for a costly and time-consuming comparative hearing and by facilitating the early inauguration of a new FM service in Ocean City, Maryland. A principal of each applicant also declares under penalty of perjury that no application was filed for the purpose of reaching or carrying out a settlement. Wind has demonstrated that the monetary consideration it is to receive does not exceed its legitimate and prudent expenses.

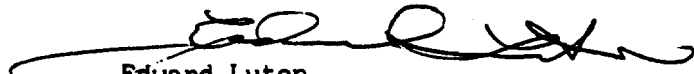
4. JH will be permitted to withdraw its pledge to divest its interests in Station WBSK-FM, Windsor, Virginia. Reform of Comparative Hearing

1 In view of the settlement of this case, the following pleadings are dismissed as moot: a) Petition to Dismiss, filed May 13, 1992 by JH; 2) Petition to Intervene, filed May 8, 1992 by Family Stations, Inc.; and c) Motion to Dismiss, filed May 15, 1992 by P.M. Broadcast Engineering, Inc.

Process, 6 FCC Rcd. 157, 159-60 (1990), recon. granted in part, 6 FCC Rcd. 3403 (1991). The joint petition will be granted.

IT IS ORDERED that the Joint Petition IS GRANTED and the Settlement Agreement IS APPROVED; IT IS ALSO ORDERED that the Application of Wind N' Sea Limited Partnership IS DISMISSED with prejudice; IT IS ALSO ORDERED that the Application of JH Communications IS GRANTED, and this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION


Edward Luton
Administrative Law Judge

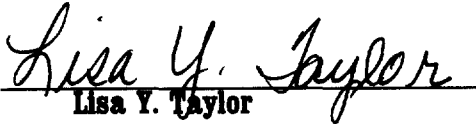
CERTIFICATE OF SERVICE

I, Lisa Y. Taylor, a secretary in the law firm of Bessozi, Gavin & Craven, do hereby certify that copies of the forgoing **"MOTION TO EXPEDITE RESOLUTION OF SETTLEMENT AGREEMENT"** were, on this 12th day of April, 1994, sent by first-class U.S. mail, postage prepaid, to the following individuals (except as otherwise noted):

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Lisa Y. Taylor

* Delivered by hand